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In This Issue

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THE NEW PRESIDENT OF THE ASSOCIATION

President Millikan

CHARLES ENGLISH (PAT) MILLIKAN, the new president of the Association has had, and, we predict, for a long time will continue to have, an active and varied career.

He was born near Marion, Kentucky, on January 27, 1890, and received his elementary and high school education in Kentucky and in Illinois. He received a degree of Bachelor of Laws from the University of Southern California in 1912, and a degree of Master of Laws from the same university in 1913.

From 1913 to 1925 (except for a break hereafter mentioned) he taught in the School of Law of the University of Southern California, and for several years before the end of his teaching career he was a professor of law and the assistant to the dean. Even after he terminated his teaching career he was pressed into service on occasions by the university, as we personally can testify from having studied Constitutional Law under his kindly (appearing, but sometimes the appearance was deceiving) eye and sharp wit. We never shall forget the Constitution following the flag—Professor Millikan carrying the flag and the students pursuing him with the Constitution. His knowledge and under-

standing of fundamentals, theories, and concepts surprised many of the bluffing smart students who were misled by teacher's quiet good manners and soft-spoken ways.

Pat was in the Army from 1917 to 1919 and held the commission of Lieutenant in the air service. His activities have included college athletics (football, basketball, and baseball) while a student, coaching baseball at the University of Southern California, Kiwanis (president of the Los Angeles club, governor of the California-Nevada district, member of the International Board of Trustees), etc., etc.

We cannot speak from personal experience of his capabilities as a practitioner, but persons whose word we take who have had him for an adversary warn us never to be lulled by the kindly eye and unassuming manner mentioned above.

In all fairness to Pat, we must add that you will read this little piece just as soon as he will.—E. W. T.

EDITORIAL

Attention is directed particularly to the article appearing in this number of the BULLETIN on pending legislation relating to requirements for admission to practice law in California, by Goscoe O. Farley, Secretary of the Committee of Bar Examiners of the State Bar. The information imparted by the article is of great importance to laymen, judges and attorneys. Maintenance of standards that admit to practice only persons who are qualified is not automatic. Such standards are established, maintained, and improved only by continuous effort of laymen and attorneys alike. Constant vigilance is required.

It is inconceivable that any person can fail to have strong convictions with respect to the pending bills that are explained in Mr. Farley's article. It is inconceivable that anyone can fall in the "no opinion" class wtih respect to these bills. The BULLETIN urges each reader to write to the assemblyman from his district and the senator from his county expressing his opinion.—E. W. T.

PENDING LEGISLATION RELATING TO REQUIREMENTS FOR ADMISSION TO PRACTICE

By Goscoe O. Farley*

AN UNUSUAL number of bills relating to requirements for admission to practice law have been introduced at this session of the legislature. A summary of some of their more important provisions and effects is presented here for the information of the profession. The State Bar is opposed to all the bills mentioned herein.

SENATE BILL 1370 (Tenney)

This bill would amend section 6062 of the Business and Professions Code to provide that attorneys from other states who have practiced for four years and who served in the armed forces during World War II may be admitted to practice law in California without an examination. At the present time, and this has been true since 1932, all attorneys from other jurisdictions who apply for admission in this State are required to take what is called the attorneys' examination. This examination is less academic than the students' bar examination and is based primarily on fields in California law the applicant should learn before starting to practice here. Community Property, and Pleading, Practice and Procedure are emphasized. The attorneys' examination is thought to be justified for two reasons. Many attorney-applicants are from states having lower admission requirements than California. It would not be fair to our own 4,000 law students to be required to meet higher standards than persons from other states. Secondly, an applicant from another state should be examined to determine whether he is

*Secretary of the Committee of Bar Examiners of the State Bar of California. Mr. Farley, a native of Indiana (1906), received his pre-legal education at the University of California in Berkeley and a Bachelor of Laws degree from Hastings College of Law (1937). He practiced in San Francisco until 1943, when he entered the Army. He took up the duties of his present position when he was released from active service in 1945.

reasonably familiar with California law before being licensed in this State.

The number who could be admitted under this bill undoubtedly is many thousands. What is more important to the public, many of them would not meet the standards which have been in effect in this State for the past 15 or 20 years.

SENATE BILL 131 (Tenney)

This bill would amend section 6060.5 of the Business and Professions Code to permit certain additional veterans to be admitted without examination. The present act waives the bar examination for those who graduated from an accredited law school after September 16, 1940, who thereafter served in the armed forces *before* taking a bar examination, and who were residents of this State at the time they entered military service. The primary purpose of the present act enacted in 1946, was to benefit those who went into military service immediately after graduation and who consequently had no opportunity to take the bar examination at the time they were best prepared for it. This bill would likewise waive the bar examination for those who had an opportunity to and did take the bar examination before being called away for military service, but failed to pass it. Most of these veterans also have had an opportunity to take five or six bar examinations since they were separated from military service.

The requirement that such veterans shall have graduated from an accredited law school is no absolute assurance that they have received an adequate legal education, because when most of them matriculated in school the requirement for accreditation was merely that the school should pass an average of 35% of its students in the bar examination. Some of these schools are no longer accredited.

ASSEMBLY BILL 318 (Elliott)

The Elliott bill seeks to do four things. First, it would eliminate the rule adopted by the State Bar in 1947 requiring an applicant to obtain permission from the Committee of Bar Examiners in order to take the bar examination more than three times. This rule was recommended by the Committee to benefit the applicants themselves as much as anything else. Previously a substantial number had taken the bar examination 12, 14, 16,

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JURISDICTION TO GRANT CUSTODY OF CHILDREN ABSENT FROM CALIFORNIA

By Stanley A. Barker*

FOR a long time, the courts in California have wrestled with the problem of whether, and to what extent, a court in California has jurisdiction to make a custody order which affects a child who is absent from the state. The law of California with respect to this problem may be classified and summarized as follows.

Date for determination of jurisdiction. In an action to determine the custody of a child, or in an action in which the determination of custody is an important incident (such as an action for divorce), the jurisdiction of the court to grant custody is established as of the date when the action is commenced.[1]

Nature of custody order: general statement. It has been held in California that a custody order is an order in rem.[2] Insofar as personal jurisdiction is concerned, therefore, a distinction has been made by the California courts between those cases in which there has been personal service and those cases in which there has been service by publication. For example, it has been held that in a divorce action where there is service by publication, the court has no jurisdiction to make a custody order affecting a minor child of the marriage unless that child is physically present in the state at the time of the commencement of the action.[3] The reason is that although service by publication is a valid service in an action in rem, it is valid only if the res (in this

*Mr. Barker is a member of the Association. He holds a Bachelor of Science degree (summa cum laude) from the University of Southern California, and a Bachelor of Laws degree from the same university. He served four years in the U. S. Naval Air Corps and held the rank of lieutenant when he was released from active service. In 1948, he delivered lectures on domestic relations under the sponsorship of the State Bar Committee on Continuing Education of the Bar. (Photo courtesy Bench & Bar.)

[1]Sampsell v. Superior Court, 32 Adv. Cal. 827, 197 Pac. (2d) 739 (Oct., 1948); Maloney v. Maloney, 67 Cal. App. (2d) 278, 154 Pac. (2d) 426 (1944).

[2]In re Newman, 75 Cal. 213, 16 Pac. 887 (1888).

[3]De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896).

case, the child) is within the territorial limits of the state. On the other hand, if in a divorce action personal service within the state is obtained upon the defendant or if the defendant submits to the jurisdiction of the court, the court has jurisdiction to determine custody of the child if either of the two following factual situations exist: (1) the child is physically present in the state at the time of the commencment of the action, or (2) the child is domiciled in the state at the time of the commencement of the action.[4]

Child present in state when action commenced: effect of later absence. If a minor child is in the State of California at the time when an action to determine the custody of that child is commenced, the California court may make an order affecting the custody of said child even though the child later leaves the state and is absent from California at the time when the order is made.[5] For example, in *Maloney v. Maloney,*[6] a husband commenced in California an action for divorce in which, among other things, he sought joint custody of his minor children. At the time of the commencement of the action, the children physically were present in California. Subsequently, the wife filed a cross-complaint for divorce in which, among other things, she prayed for sole custody of the children. During the pendency of the action and prior to the date of the trial, the husband and the children went to the State of Nevada and established a residence there. Neither the husband nor the children returned to California for the trial. The California court gave judgment granting a divorce to the wife, awarding to the wife the custody of the minor children, and ordering the husband to pay for the support of the children. The husband appealed from the judgment on the ground that the court had no jurisdiction to make an order for the custody and support of the minor children because they were absent from the state at the time of the making of the order. The contention of the husband was not upheld. The court held, in substance, that jurisdiction to make

[4]Sampsell v. Superior Court, 32 Adv. Cal. 827, 197 Pac. (2d) 739 (Oct., 1948).
[5]Maloney v. Maloney, 67 Cal. App. (2d) 278, 154 Pac. (2d) 426 (1944).
[6]67 Cal. App. (2d) 278, 154 Pac. (2d) 426 (1944).

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JUDICIAL DRAFTSMANSHIP

By Charles A. Beardsley*

DURING the last few months, as I have mingled with lawyers in a score of states, I have found them very much concerned about the ever-increasing financial burden cast upon them by the necessity of buying, and paying office rent for, the volumes of law books that they must buy and store if they are to continue to practice law.

Many bar association committees have been trying for years to find some way of preventing the law book publishers from bankrupting the lawyers.

At last, the lawyers are beginning to discover that the fault does not lie so much with the law book publishers as with the appellate court judges, who turn out the opinions out of which the publishers make the law books. The lawyers are not as yet openly saying much about this discovery, for fear of creating an atmosphere similar to that created when a member of the congregation whistles in church.

I dislike to mention this subject, particularly on this occasion. The judges of the Supreme Court of Illinois are the guests of honor at this dinner tonight. On such an occasion, the conventional after-dinner speech merely compliments the guests of honor. And being a member of the legal profession and therefore a slave to convention, I am very much disinclined to make an unconventional after-dinner speech.

But I am conscious of my obligation to the American lawyers

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Mr. Beardsley, in a recent letter to the editor, said: "I am enclosing a reprint of a stenographic report of my original address on Judicial Draftsmanship delivered in Chicago on December 1, 1939, when I was President of the American Bar Association, which earlier address was probably the first publication on this subject; it caused considerable agitation particularly among members of the American Judiciary, which agitation culminated in the session in Seattle last September at which a half day meeting was given over to consideration of this subject matter and at which I gave an address."

This later address will be published in a later number of the BULLETIN.

who annually are paying out of their inadequate incomes many millions of dollars as the purchase price of printed volumes of the appellate court judges' opinions, and many thousands of dollars in rent for office space, in which to provide shelf-room for those printed volumes.

And, reluctantly, I have concluded that, in addition to paying to the guests of honor the compliments that they richly deserve, I should take this opportunity to confer with the guests of honor, and with the other appellate court judges here assembled, about the desirability, and about the possibility, of shortening the appellate court opinions materially—the opinions that the publishers publish—the opinions that the lawyers must buy and store.

The Apostle Paul, in his Epistle to the Galatians (5th chapter, 14th verse), declared that "all the law is fulfilled in one word." But that was a long time ago. The appellate court opinions, in which but a part of the present-day law is being fulfilled, are somewhat longer. And, since the invention of stenography and of dictating machines, and since the employment of high-speed typists and industrious legal secretaries, these opinions are steadily and rapidly getting longer and longer. Thus, an examination of the official reports of a typical American court will disclose that, although only a few of the opinions in the volumes issued a century ago are models of brevity, the opinions in the last volumes average about six times as long as those in the earlier volumes.

While substantially all other instrumentalities are being more and more streamlined to enable them to keep up with the needs of modern society, judicial opinions are becoming more and more unstreamlined, and more and more unadapted to the needs of modern society.

The increased complexity of modern society does not call for increased cumbersomeness in judicial opinions, any more than it calls for increased cumbersomeness in other society-serving instrumentalities.

Someone has observed that "obscurity of expression is the offspring of obscurity of thought,"—that "clarity of thought begets clarity of expression." And an early French philosopher tells us: "When a thought is too weak to be simply expressed, it is clear proof that it should be rejected."

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THE THREE LAWS OF PEACE

By Hon. William J. Palmer*

INHERENT in the nature of living beings and their societies are the three laws of peace. These laws *are* because they are; they exist for the same reason that a certain combination of hydrogen and oxygen is water. No substitute for them is conceivable, unless one can imagine a society in which every one, individually, and all groups, collectively, were perfectly guided by the Golden Rule, and hence wherein no law for the maintenance of peace would be necessary. To be practical, however, and to design for an attainable end here on earth, we shall not denote by the word "peace" an imaginable state of affairs among angels, but rather a possible orderly condition among men wherein the conflicts arising from clash of ambitions, desires and claims, inevitable in human association, are not permitted to course into violence, but are intelligently taken hold of and settled by attempted applications of principles of equity and fair play.

Whenever men really have wanted to establish peace in a society, they have used the three laws, although with varying degrees of wisdom, justice and injustice. They have resorted to those laws so instinctively, naturally and inevitably that in doing so they have made no claim of invention or discovery. Indeed, they have not identified the laws in simple statement and as three elementary principles, as the writer now proposes to do.

THE FIRST LAW IS AN ANCIENT LAW

This is the first law of peace: certain types of behavior must be marked as having a reprehensible significance that reaches

EDITOR'S NOTE: This is part one of a treatise by Judge Palmer dealing with the problems and methods of international peace. This part is complete within itself and is published here to provoke thought on the subject among his fellows of the profession. The remaining parts will be published in succeeding numbers of the BULLETIN.

*Judge of the Superior Court for Los Angeles County. A.B. (1913) and J.D. (1914) University of Southern California. Admitted to practice in California, 1913. Appointed Judge of the Municipal Court, Los Angeles, 1931; elected Judge of the Superior Court, Los Angeles County, 1932; re-elected 1936, 1942, 1948. Author of several books and monographs. Member of many clubs. Recipient of many honors.

beyond their immediate and respective victims, requiring that any such conduct be deemed to be an instant offense against *all* members of the society. This principle has been so long with us, and we are so accustomed to taking it for granted, that we have little or no appreciation of its greatness or of its vitality and necessity as a basis for an orderly society. Forsooth, it is amazing how many educated people apparently never have identified and studied the idea in their own thinking.

In every political state we use this first law of peace as the foundation of criminal jurisprudence. We describe certain types of behavior as crimes, distinguishing them from other wrongs that we call civil wrongs by our decision that the former constitute a threat to the security of all society or to the foundations of health and morality upon which a desirable civilization must rest. Thus, if a burglary is committed against the humblest of homes in the most remote region of the state, the offense is not regarded as a simple trespass or a wrong involving only two or three people of no great importance to society. Because of our elementary principle, the burglar commits a wrong against all members of the society, against every home, against every owner of a modest home on Chestnut Street or of a palatial residence in Sherwood Estates, against the occupants of every flat in Housing House and of every apartment in Homesworthy Arms. Logically pursuing this principle, the whole of society declares war on the culprit, apprehends, prosecutes and punishes him.

NATURE USES THE FIRST LAW OF PEACE

Nature herself employs the first law of peace. We do not know how extensively she employs it, but we have an example in the system of nerves and pain that she installed in the society of living beings called the body. An injury to the littlest toe, a small stone in the shoe, causes pain which annoys the whole man, who forthwith declares war against the cause and directs against it such available resources as he deems necessary to relieve and protect the offended member. The wisdom and necessity of these provisions will be appreciated if we note that even in spite of them certain primitive peoples have practiced the distortion or disfigurement of their bodies as a fashion or a rite.

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THE LEGAL STATUS OF DELIVERED PRICING METHODS

By Wayne H. Knight*

A BUSINESS MAN who today markets a standardized commodity, such as steel or cement or any other commodity meeting standard specifications, finds himself along with his lawyer in a well nigh hopeless quandary as a result of the recent decision of the U. S. Supreme Court in the Cement case[1] and the announced attitude and position taken by the Federal Trade Commission.

The difficulty concerns the problem of meeting a competitor's lower price in a given market to which a commodity may be transported for sale. The seller who does not meet his competitor's lower delivered price may be forced to withdraw from the market. The seller who elects to remain competitive and serve his regular customers by meeting the lower delivered price being quoted by a competitor in the distant market may do so by "absorbing" a part of the cost of transporting the commodity from shipping point to destination point. In such case the seller would realize a lower net return on such sales than the return from sales in markets located closer freightwise to his mill or factory. The Federal Trade Commission has indicated, however, that by reason of such varying net returns and the identity of delivered prices at destination point a seller using such pricing method as a regular course of business would be engaged in a practice regarded as suspect.

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*Wayne H. Knight was born in Salt Lake City, Utah, April 17, 1908; he received his A.B. degree from the University of Utah in 1933, and a J.D. degree from George Washington University in 1937; he served in the office of the General Counsel, Securities and Exchange Commission from 1938 to 1942; he was Attorney in Charge, San Francisco Office, Alien Property Custodian, 1943-45. Mr. Knight, since 1947, has been a member of the firm, Overton, Lyman, Plumb, Prince & Vermille, and is a member of the California and District of Columbia Bars.

[1]Federal Trade Commission v. Cement Institute, 333 U. S. 683, 68 S. Ct. 793, 92 L. Ed. 806 (1948).

PRICING UNDER FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission has taken the position that "the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion" and therefore such "conscious parallelism of action" constitutes a violation of the Federal Trade Commission Act.[2]

In the Rigid Steel Conduit case[3] the Federal Trade Commission found that even in the absence of agreement, combination, or conspiracy, mere adherence to an industry-wide basing point formula, with knowledge that other concerns were adhering to it also, constituted in itself a violation of the Federal Trade Commission Act. The Circuit Court agreed and on this point said:

> "We now turn to consider petitioner's contention that the *individual* use of the basing point method, with knowledge that other sellers use it, does not constitute an unfair method of competition. . . .
>
> "In the light of that opinion [in the Cement case] we cannot say that the Commission was wrong in concluding that the *individual* use of the basing point method as here used does constitute an unfair method of competition." [Italics ours.]

In the Cement case the Federal Trade Commission found that the use of a multiple basing point system of pricing pursuant to a conspiracy was an unfair method of competition. The Supreme Court sustained this finding. In holding illegal the use of a pricing system established or maintained pursuant to combination or agreement in restraint of trade, the Court merely affirmed existing law. But in that case the Court went on to make certain statements which, when read in the light of pronouncements of the Federal Trade Commission and the ruling in the Rigid Steel Conduit case, have given rise to great confusion. Among other things the Court in the Cement case said:

> "While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Trade Commission Act." . . .

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[2]Statement of Federal Trade Commission Policy Toward Geographic Pricing Practices for Staff Information and Guidance, dated October 12, 1948.

[3]Triangle Conduit & Cable Co. v. Federal Trade Commission, 168 F. (2d) 175 (1948) (C. C. A. 7th).

> ". . . individual conduct . . . which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act."

PRICING UNDER CLAYTON ACT

It may be fairly said that prior to the Cement decision business men assumed and were advised that it was not unlawful, in the absence of conspiracy or agreement in restraint of trade, for a manufacturer to absorb or equalize freight charges in order to meet the delivered prices of competitors more favorably situated freightwise with reference to a given market, regardless of the pricing methods utilized by them individually.

This position was based upon the belief that a price discrimination, otherwise unlawful, was lawful when made in good faith to meet the equally low price of competitors under the statutory exception contained in Section 2(b) of the Clayton Act.

But in the Cement case the Court indicated that the statutory exception which would permit a seller to meet competition is limited to "individual situations" and that a seller may not "systematically" absorb freight to meet the lower prices of a competitor. The Court did not define nor explain what it meant by the use of the terms "individual situations" or "systematic" freight absorption. One school of thought is that the Court made it clear that a company may not absorb freight "day in and day out" to meet competition in its normal market, but may do so only occasionally or sporadically.

In this connection the Federal Trade Commission in its statement of policy toward geographic pricing patterns[4] stated in part:

> ". . . The courts appear to have assumed, though the point has not been squarely decided, that a single seller has a substantive right in good faith to meet the equally low price of a competitor in individual transactions. They have not adjudicated the question whether a single concern, not engaged in an effort to create a monopoly by destroying competitors, may systematically reduce its prices to meet competition in localities where it habitually encounters such competition; and whether reciprocal reductions of this character are permissible *so long as they are sufficiently infrequent and void of*

[4]Footnote 2, *supra.*

> *industry-wide systematic effect as to afford a variety of prices and indicate an absence of collusion.*" [Italics added.]

It thus appears that if one company uses a basing point method of pricing in a market area in which different methods of pricing are used by its competitors, and identity of prices is not in fact achieved, there would be no ground for a charge of collusion. Stated otherwise, one manufacturer may use a basing point method of pricing, or any other method of pricing, which results in identity of prices only so long as his competitors refrain from using a like method. The legality of a pricing method is thus made to depend upon what a competitor determines to do, even though such competitor acts independently.

DEFINITION OF PRICE

Another important factor giving rise to current confusion as to the legality of delivered pricing methods is the theory advanced by the Federal Trade Commission that the term "price," as used in the Clayton Act means the seller's "mill net." The term "mill net" is said to be that portion of the delivered price, or what the buyer pays, that remains after deducting the cost of transportation.

It is obvious that under any uniform delivered or zone price system a smaller "mill net" accrues to a manufacturer on sales made to distant buyers than on sales made to buyers located closer freightwise to the point of shipment. The Commission contends that it is a discrimination when sales are made at the same delivered price to different customers when transportation costs vary due to the unequal distances involved. The discrimination is said to be illegal when the varying "mill nets" tend to injure competition.

It should be here noted that the Federal Trade Commission supported a definition for the then proposed Robinson-Patman Act which the late Chief Justice Stone of the Supreme Court said:

> ". . . would have defined 'price,' as used in Section 2 of the Clayton Act, as meaning 'the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor.'

> "The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f.o.b. factory basis, in order to avoid the prohibited discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. These effects were recognized in the Committee's report. . . ."[5]

Nevertheless, such proposed definition, once rejected by Congress, seems to have found its way into the law as a result of the theories advanced by the Federal Trade Commission and the apparent adoption of such theories by the courts. This situation is cause for grave concern.

GEOGRAPHIC PRICING PRACTICES

In considering and commenting upon the various types of geographic pricing practices, such as f.o.b. mill selling without freight absorption, basing point systems, uniform delivered or zone prices and systems of freight equalization, the Commission has stated that any pricing practice which produces identical delivered prices among competitors and which is in general use in an industry will be suspect of being a device for collusive fix-

[5]Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 737, 65 S. Ct. 961, 89 L. Ed. 1320 (1945).

ing of delivered prices. The Commission has indicated that f.o.b. mill pricing without freight equalization among sellers, is not suggestive of collusion.

Faced with the foregoing uncertainties in the law large segments of heavy industry in the nation have as a measure of safety, if not because of strict legal requirement, abandoned long standing methods of quoting delivered prices in favor of f.o.b. mill selling without freight absorption.

As a result of such action many manufacturers and communities have been adversely affected. Fortunately the current sellers' market has served to cushion somewhat the adverse economic consequences of the shift to a new price structure. Unless, however, the law is clarified, either by court action or new legislation, it is reasonable to forecast that the advent of a buyers' market will produce new and drastic dislocations in the American economy.

NEW LEGISLATION

Last fall a Sub-Committee of the Interstate and Foreign Commerce Committe, was directed by Senate resolution to conduct a thorough investigation into the impact on the national economy of the policies of the Federal Trade Commission, as interpreted by the Supreme Court, with respect to delivered prices by industry, freight absorption, and other related subjects. As a result of the hearings held and recommendations made a bill, generally known as the Johnson Bill, has been introduced in the Senate with a companion bill in the House, the purpose of which is to clarify delivered pricing practices and particularly the right of a single seller to absorb transportation costs in order to meet competition in distant markets.

Also, within the past few weeks the Supreme Court has agreed to review the decision of the lower court in the Rigid Steel Conduit case. The Supreme Court's ruling is expected to clarify the full meaning of the Cement decision and the legal status of delivered pricing systems and particularly the legality of freight absorption when used by an individual seller in the absence of agreement or conspiracy in restraint of trade.

In view of the present uncertainty and confusion in the law the American business man is unable to plan intelligently or to determine upon a marketing program with safety as to the legal consequences. His right to use independently established delivered pricing systems and to absorb freight to meet competition in good faith in any and all markets must be made certain and clear so that the American system of competitive free enterprise may grow and remain strong.

THE THREE LAWS OF PEACE

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In every well-ordered home the first law of peace is an effective principle. Although children themselves may be permitted to handle minor frictions, limited in significance to themselves, certain rules are established, the violation of any of which is deemed to be an offense against the whole family and the home. Such a violation brings parental discipline into play, not to serve any selfish interest of the parents, but to preserve the peace and order of the home.

ONLY ONE ROAD TO "ONE WORLD"

In brief, we now are fully aware of and we now use the first law of peace whenever we choose to have peace in any realm of practical affairs. Desiring peace, we have no choice but to establish and enforce that foundation principle. Whenever we really want international peace, we shall solemnly and with the strongest possible intent of enforcement agree to the principle that an act of aggressive warfare by any nation against any other shall constitute war against all the nations of the earth, whereupon each party to the compact shall take precisely the same measures that it would take if itself had been attacked, and all the signatories shall unite in whatever measures may be deemed necessary to bring the war so commenced against them to a prompt and just conclusion. Advocacy of world peace without knowledge of these elementary truths is but the effusion of hopeful innocence, and advocacy of world peace which has such knowledge and ignores it is hypocrisy, if not fraud.

THE ALTERNATIVES—COURTS OR BOMBS

The second law of peace proceeds from the first logically and necessarily. When we notify the members of a society that they may not use violence in pursuit of a quarrel or an ambition or an emotion without thereby arraying themselves against the whole of society and all its members, we are required in good conscience to provide a means by which grievances and controversies between members may be heard and brought to peaceful conclusions that will reflect sincere efforts to achieve justice. Thus, the second law of peace requires that every controversy

which the involved parties themselves are not able to settle peacefully must be submitted to a tribunal for adjudication. We are thoroughly familiar with this law also, and have used it for ages within tribes, communities, states, and other societies. Hence, we have no excuse for not knowing that it is essential in any sincere and practical plan for peace within a larger society, one that extends beyond national boundaries and embraces peoples under different governments, the interests and ambitions of which may clash.

THE THIRD LAW PUTS POWER BEHIND THE COURT

The third law of peace proceeds from the first and second logically and necessarily. A court is such in a pure sense if its decrees are backed by a power authorized to enforce them and capable of doing so. Without such enforcement we can have a forum but not a court. Hence, the third essential and final principle in the legal foundation for peace is that the same authority that establishes the court for the settlement of controversies shall be committed to and shall execute the final judgments of that court whenever the involved parties fail to do so.

A few enlightened people, determined to avoid the economic waste and the strain, ill will and other injury caused by strife between labor and management, have invoked the three laws of peace in the industrial field. The resultant procedure is called "compulsory arbitration"—a term which, although accurate, connotes only a fractional view of a judicial system that provides opportunity for the peaceful solution of controversies involving labor and capital. The same opportunity that we provide a partner, for example, to use the processes and authority of a court to obtain an accounting never has been referred to as compulsory arbitration. Neither have the judicial processes that have been made available to any person or group of persons seeking redress of wrong or a declaration of rights.

It may fittingly be doubted whether a people that has not learned to make full and just use of the three laws of peace to maintain a reasonably satisfactory degree of peace within its own land is prepared to assume a role of leadership in establishing international peace. Its failure in one field and its failures in the other doubtless result from the same limitations in vision, discipline, character and purpose.

JUDICIAL DRAFTSMANSHIP

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Shorter judicial opinions might be forthcoming, if the judicial draftsmen would keep in mind Sydney Smith's admonition: "Brevity in writing is what charity is to all other virtues. Righteousness is worth nothing without the one, nor authorship without the other." Bowker filed a brief concurring opinion, in which he observed: "It's all right to have a train of thoughts, if you have a terminal."

If the judges would use fewer words, they would not only reduce our law book bill; they would also make it easier for us to find out what their opinions mean. As John Ray observed: "He who uses many words for explaining any subject, doth, like the cuttle fish, hide himself in his own ink."

I wonder if it ever occurred to the judges that not infrequently, when the lawyers read the judges' opinions, they are reminded of the verse:

> "They do not write in verse or prose;
> They simply lay their words in rows.
> The self-same words that Webster penned,
> They merely lay them end to end."

It would not be so bad if the judges merely laid their own words "end to end." If that were all the judges did, in the natural course of events, after a time, they would run out of words.

But the judges don't stop when they run out of their own words. They cause their typists to copy paragraph after paragraph, and sometimes page after page, of other judges' words—all of which copied words the lawyers have already bought and paid for and stored on their book shelves.

Although nothing of this kind ever happened with an Illinois opinion, often these paragraphs and pages of words that the typists copy have little or no relation either to the case being decided or to each other. And sometimes the copyists produce opinions that remind us of the school boy's essay on cows:

"Cows is a very useful animal. Cows give milk. But, as for me, give me liberty or give me death."

No doubt, the lawyers themselves, as a means of reducing their annual law book bill, would be glad to help the judges write

shorter opinions. The lawyers have more time than have the judges to familiarize themselves with the cases that the judges are called upon to decide. The judges accept the lawyers' aid in the marshalling of the facts and in finding and applying the law. Why not go one step further and accept their aid in drafting the opinions?

Some courts have rules requiring counsel for the appellant to print, in a few lines on a separate page of his opening brief, a statement of the question involved in the case—a rule that has produced notable results in clarity and conciseness of statement of issues. Why not adopt a rule requiring counsel on each side to append to his brief—on a strictly limited number of pages—preferably not more than two or three pages—a suggested opinion announcing a decision in favor of his client? Counsel's knowledge of his case should enable him, at least after a little practice, to write an acceptable opinion. And his interest in his case would prompt him to do his best. The judges might be able to adopt many of the suggested opinions *in toto*, or at least in substantial part. If they could, it would save the judges a lot

of work and give them more time for recreation. And even if the submitted opinion could not be used, it would do no harm.

Another thing that might help would be for the lawyers to present a warning sign to every appellate court judge. The presentation might be accompanied by a letter reading something like this:

"Dear Judge:

"We respectfully request you to hang the accompanying sign in your chambers, where you will face it as you dictate your opinions.

"It will serve as a reminder that, if we are to continue to practice law, we must buy and provide office space for the many volumes of law reports in which your opinions are printed. At the present time these law reports are costing us millions of dollars per year; and year after year your opinions are getting longer and longer.

"When dictating your opinions, please remember that in effect you are sending us collect telegrams.

"Since we must pay for every word, every line, and every page, we would greatly appreciate your being as brief as you would be if you were sending the telegrams prepaid.

"You could save us much money if you would merely refer us to the volume and page of your former messages instead of repeating paragraph after paragraph and page after page of former messages for which we have already paid.

"And, in your recital of the facts, we suggest that you take as your model the school boy's essay on Elijah:

" 'There was a man named Elijah. He had some bears, and lived in a cave. Some boys tormented him. He said: "If you keep on throwing stones at me, I'll turn the bears on you, and they'll eat you up." And they did, and he did, and the bears did.'

"Respectfully and prayerfully yours,

"The American Lawyer."

The sign might read as follows:

Warning

To Appellate Court Judges

Your opinions are collect telegrams
to lawyers. Don't bankrupt them.

We recognize that the American judges have made, and are now making, an outstanding contribution to the stability of our organized American society. We are aware of the increasing burdens placed upon them. And we appreciate the fidelity with which they have carried, and are now carrying, those burdens.

If sometimes we suggest to the members of the judiciary that there is a possibility of improving the service that they render to society, we make such suggestions without rancor, and solely in a spirit of helpfulness. We make such suggestions because we honor and respect the members of the judiciary and because we desire to assist them, in all practical ways, to improve the service that they render to the American people and thereby to gain for themselves, and for the courts over which they preside, a still larger measure of honor and respect, not only from the members of the bar but also from all of the American people.

It is for this purpose, and in this spirit, that I have made some suggestions this evening of the possibility of improvement in the service rendered by the American judiciary.

And I venture to express the opinion that the American court that will set itself resolutely to the task of demonstrating to itself, and to all other American courts, a practical method of reducing substantially the length of the volume of law reports that this generation of American lawyers and all future generations of American lawyers must buy and store, will render such an outstanding service that it will gain from the American people, for itself and for all the American judiciary, a still larger measure of honor and respect. And I venture to express the opinion, further, that that court will gain for itself from the American lawyers a still larger measure of gratitude and affectionate regard.

And, if the court that thus gains this larger measure of honor, respect, gratitude and affectionate regard could only be the Supreme Court of Illinois, I would then be assured that the guests of honor have forgiven me for having made, on this occasion, an unconventional after-dinner speech.

LEGISLATION RELATING TO ADMISSION REQUIREMENTS

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or, in one case, 19 times, without ever coming very close to passing. Most of them had received little education (if an applicant commences the study of law after reaching 25 years of age he does not have to have any formal education) and were not qualified to practice law. They were wasting their time and money taking and retaking the bar examination without being properly prepared to pass it. The State Bar rule does not absolutely prevent an applicant from taking the bar examination more than three times, but rather requires him to show that he has taken some effective steps to overcome the causes of his previous failures. The practice of the Committee is to interview each applicant requesting permission to take the bar examination more than three times. If he indicates that he will complete a course of study which will give him a reasonable expectation of passing the examination, he is given another chance. To date only four applicants have been denied permission to retake the bar examination. They had taken the examination 15, 12, 8 and 3 times, respectively, and could show no better preparation for the next examination than for the ones failed.

All but 16 states have rules of one kind or another limiting the number of times the bar examination may be taken. It is interesting to note that in Massachusetts the bar examiners adopted a rule similar to the California rule. When the legislature enacted a law forbidding the enforcement of such a rule, the Massachusetts Supreme Court refused to recognize the power of the legislature over such matters.

Secondly, the bill provides that the fee for an examination shall not exceed $25 for the first examination, nor $10 for a subsequent one. The present act (Business and Professions Code, Sec. 6063) provides that applicants shall pay such reasonable fees as are required to defray the expenses of administering the provisions of the State Bar Act relating to admissions.

The bar examination fee had been $30 for many years prior to the last examination, when, due to a substantial increase in expenses since the War, the fee was raised to $40. The actual

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Silver Memories

Compiled from the Daily Journal of April, 1924
By A. Stevens Halsted, Jr., Associate Editor

ASSOCIATE JUSTICE **Louis W. Myers** has been named by Governor **F. W. Richardson** to succeed **Curtis D. Wilbur** as Chief Justice of the California Supreme Court, following the latter's appointment as Secretary of the Navy by President Coolidge. Chief Justice Myers is expected to set a high standard in his work as head of California's highest court, as his ability is recognized throughout the state. Justice Myers in one of the two residents of Los Angeles on the present Supreme Court.

* * *

Harlan Fiske Stone has been nominated by President Coolidge as successor to Harry M. Daugherty, Attorney General of the United States. Since 1920 Stone has served as Dean of Columbia Law School. He was a classmate of President Coolidge at Amherst College.

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George E. Stoddard, who for the past year has been clerk of Judge **Thomas L. Ambrose's** department of the Justice Court, has entered private practice with **Thomas F. Calhoun.**

* * *

Judge **John W. Shenk** of the Los Angeles County Superior Bench will fill the vacancy on the State Supreme Court bench created by the advancement of **Louis W. Myers** to the Chief Justiceship. Judge Shenk graduated from the University of Michigan and practiced law in Los Angeles for many years. He was formerly Assistant City Attorney, later becoming City Attorney. He was once a candidate for Mayor of Los Angeles, and was appointed to the Superior Bench in 1913.

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per capita cost of giving the examination is approximately equal to the present fee of $40.

A few states have a substantially higher fee than California. In many of the states having a lower fee, on the other hand, the number of applicants for admission is small and there is no need for a permanent staff and a separate office for the bar examiners, such as the larger states require. In these smaller states the clerk of the supreme court or some such official receives and processes the applications along with his other duties, and the examination questions are prepared and the books graded personally by the members of the board of bar examiners. The result is that the expenses are quite small.

In California and some of the other states, in order to have an examination of the highest quality, the questions and analyses thereof are obtained from out-of-state law school professors who are compensated for their service. The grading is done by a paid staff of highly-qualified readers. A thorough investigation of the applicants' moral character is made. Expenses are consequently greater.

Where an applicant has previously been admitted to practice in another jurisdiction a thorough investigation is made of his moral character by the National Conference of Bar Examiners, an organization of the bar examiners of 34 states. These investigations have stopped or deterred a substantial number of lawyers of bad repute from becoming admitted here. The cost of such investigations is $50 each. It is hoped that if any legislation is enacted fixing examination fees, provision will be made to continue obtaining National Conference reports.

Thirdly, the bill provides that applicants who fail to pass the examination shall not be reexamined in those subjects in which they receive passing marks. It is believed that no state has a provision like this, although in New York and one or two other states the examination is in two parts: adjective law and substantive law. If an applicant in those states passes in one part he is not reexamined in that part.

The California bar examination, which has been described as one of the best in the country, is designed to enable a staff of 17 well-qualified lawyers working together to determine whether an applicant shows an adequate over-all ability as a lawyer. The examiners cannot perform their function as well if an applicant is permitted to take the examination piecemeal, as it were, concentrating on the questions in only a few subjects at each examination.

Fourthly, the bill would require two bar examinations to be given each year. Before and during the War only one bar examination was given each year, in October. Immediately after the end of hostilties the Committee commenced giving two examinations each year, in April and October, because many of the law schools had speeded up their courses and were graduating students after 24 months of study and at all seasons of the year. Most schools eventually came to the conclusion that the accelerated program was detrimental to legal education and as a result of a meeting in 1947 between representatives of the law schools, the Committee of Bar Examiners, and the profession, the Committee announced that it would return to the normal schedule of one bar examination each year in 1950. As a result of this announced policy most of the law schools discontinued the accelerated courses of instruction and returned to the normal three-year course, which they had desired to do. The Committee's policy of one examination each year is concurred in by the deans of most law schools. The following are typical comments of deans favoring one examination:

"We think that as far as our student body and curriculum are concerned further Spring bar examinations are no help and mainly a temptation to hasty and shallow law study."

"The Faculty does not favor the giving of more than one Bar Examination per annum. None of the graduates of the College will be benefited by the giving of an April 1950 bar examination. Neither, in our opinion, will anyone else."

"The School is opposed to the giving of spring examinations after 1949. In reliance upon your announced policy discontinuing spring examinations after that year we have ended our

accelerated program and returned to our normal three year course. As a result we will not have any students eligible to take the bar examination in the spring of 1950. It is our feeling that the announcement was made sufficiently far in advance to permit law students to adjust their schedules, and that those who are about to graduate in December 1949 or January 1950 have been sufficiently warned that they will have to wait."

The question of whether more Spring bar examinations should be given is still under consideration by the State Bar and no final determination has yet been made.

One more bill should be mentioned briefly. Senate Bill 183 (Tenney) is more or less similar to three of the provisions of the Elliott bill mentioned above. It would likewise require two bar examinations each year, and would permit an applicant to be reexamined upon payment of the fee and proof of further study and of good moral character. The bill also fixes the maximum fee at $40 for the first examination and $20 for subsequent examinations. Some of the comments on the Elliott bill would likewise be applicable to this bill.

CALIFORNIA CUSTODY ORDERS

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a custody order attaches when the action is commenced, and that once jurisdiction has attached, it is not defeated by subsequent events. This decision indicated that if the children had been removed from the state before the action was commenced, the court then would not have had the power to grant custody. This dictum, however, later was qualified and limited by the recent decision of the California Supreme Court in *Sampsell v. Superior Court*,[7] which will be discussed later in this article.

Child absent from state when action commenced. (a) *Absence plus lack of domicile.* If a minor child neither is present in California nor domiciled in California at the time when an action to determine the custody of that child is commenced, the California court has no jurisdiction to make a custody order affecting the child.[8] For example, in *In re Chandler*,[9] a wife commenced in California an action for divorce. Prior to the date of the commencement of the action, her husband had taken their minor children to Texas, where the children acquired a new domicile. After the wife's complaint for divorce was filed, the husband left the children in Texas and he came back to California, where he submitted to the jurisdiction of the California court by making a personal appearance in the divorce action.

[7]32 Adv. Cal. 827, 197 Pac. (2d) 739 (Oct., 1948).
[8]In re Chandler, 36 Cal. App. (2d) 583, 97 Pac. (2d) 1048 (1939); Boens v. Bennett, 20 Cal. App. (2d) 477, 67 Pac. (2d) 715 (1935).
[9]36 Cal. App. (2d) 583, 97 Pac. (2d) 1048 (1939).

The California court, among other things, made an order directing the husband to bring the children back to California and to produce them at the divorce trial. This the husband refused to do. The California court then cited the husband for contempt, and he was put in jail. He then petitioned for a writ of habeas corpus on the ground that since the children were not in California and were domiciled in Texas when the divorce action was commenced, the California court had no power to make any order with respect to the children. The contention of the husband was upheld.

(b) *Effect of domicile in California while absent from state.* Even though a child is not physically present in the State of California when an action to determine the custody of that child is commenced, the California court still has the power to make a custody order affecting that child provided that the child was domiciled in the State of California at the time of the commencement of the action and provided, further, that there was a valid personal service on the defendant in the action. In substance and in effect, this was the holding of the California Supreme Court in the recent case of *Sampsell v. Superior Court.*[10] In the *Sampsell* case, the court pointed out that if a minor child resides in one state and is domiciled in another, both the state of the child's residence and the state of the child's domicile have a sufficient interest in the child to give rise to jurisdiction over the child. In other words, both states would have the power to make custody orders affecting the child. The California Supreme Court stated in the *Sampsell* case that if a child is domiciled in California but is not physically present in this state when an action to determine the child's custody is commenced, the absence of the child would be sufficient to justify the California court, in its discretion, in refusing to exercise the jurisdiction which the court has over the child by virtue of the child's domicile. However, the mere absence of the child from the state will not, in itself, deprive the California court of the power to make a custody order, and a refusal to make such an order on the ground of lack of jurisdiction would be improper.

[10]32 Adv. Cal. 827, 197 Pac. (2d) 739 (Oct., 1948).